

Contents

1 Introduction	1
1.1 Delimitation of the Subject Matter	2
1.1.1 Distinction from Other Means to Enforce Articles 101 and 102 TFEU	5
1.1.2 Distinction from Similar Powers in the Fields of Anti-dumping, State Aid and Article 106 TFEU	5
1.1.3 Distinction from Merger Remedies	7
1.1.4 No Comparative Study	8
1.1.5 No Study of General Usefulness of Remedies, nor of Political or Economic Expediency	9
1.2 Terminology	9
1.2.1 Remedy	10
1.2.2 Structural and Behavioural Remedies	10
1.3 The Importance of Soft-Law	11
1.4 Outline	12
Bibliography	13
2 Prolegomena	15
2.1 Fundamentals Regarding Article 7 and Article 9 as Legal Bases for the Adoption of a Remedy	15
2.1.1 Article 7	15
2.1.2 Article 9	16
2.1.3 Distinction of the Article 9 Procedure from the Settlement Procedure in Cartel Cases	17
2.2 The Alrosa Case and Its Criticism	17
2.2.1 The Case	18
2.2.1.1 The Facts	18
2.2.1.2 The Judgment of the General Court	19

2.2.1.2.1	Violation of Article 9 and the Principle of Proportionality	19
2.2.1.2.2	Violation of Alrosa’s Rights of Defence	20
2.2.1.3	The Opinion of Advocate General Kokott	21
2.2.1.3.1	Violation of Article 9 and of the Principle of Proportionality	21
2.2.1.3.2	Violation of Alrosa’s Rights of Defence	23
2.2.1.4	The Judgment of the Court of Justice	24
2.2.1.4.1	Violation of Article 9 and of the Principle of Proportionality	24
2.2.1.4.2	Violation of Alrosa’s Rights of Defence	25
2.2.2	Essential Criticism and Preliminary Comment	25
2.2.2.1	Summary of the Criticism Regarding the Modified Proportionality Test	26
2.2.2.2	Comment	28
2.2.2.2.1	The Judgment Is Generalisable Only to a Limited Extent	28
2.2.2.2.2	The Modification of the Proportionality Test Applied by the Court Raises at Most Limited Concerns Regarding the Interest of the General Public in the Protection of the Competitive Process	30
2.2.2.2.3	Intermediate Conclusion on the Modification of the Proportionality Test in the Alrosa Judgment	35
2.3	The Broader Context: The Development of the Commission’s Practice and the Explanations for the Frequent Occurrence of Commitment Decisions	37
2.3.1	Development of the Practice: A Shift Towards a “Culture of Consent”?	39
2.3.1.1	Empirical Observations	40
2.3.1.1.1	Regarding Commission Decisions	40
2.3.1.1.2	Regarding Court Procedures	42
2.3.1.2	A Change of Paradigm?	43
2.3.2	Explanations for the Frequent Occurrence of Commitment Decisions	47
2.3.2.1	Incentives and Disincentives for a Commitment Decision	48
2.3.2.1.1	Incentives	48
2.3.2.1.2	Disincentives	52

2.3.2.1.3	Intermediate Conclusion	54
2.3.2.2	Replacement of Exemption Decisions That Existed Under Regulation 17/62	55
2.3.2.3	The Impact of the More Economic Approach	56
2.3.3	Conclusion	57
	Bibliography	58
3	The Relaxation of the Link Between Harm and Remedy	63
3.1	Introduction	63
3.1.1	The Importance of the Link Between Harm and Remedy in the Context of Article 7: A Barrier Against the Blurring of the Boundaries Between Competition Law and Regulation	63
3.1.1.1	The “General Clause” Character of Article 7 and the Difficulties of Defining Limits for the Content of an Article 7 Remedy	64
3.1.1.2	The Link Between Harm and Remedy As a Barrier Against the Blurring of the Boundaries Between Competition Law and Regulation	65
3.1.2	The Criticism Regarding the Relaxation of the Link Between Harm and Remedy in the Context of the Article 9 Procedure: A Shift Towards Increased Enforcement Errors and Regulation	69
3.1.2.1	Abstract Risk of Enforcement Errors	69
3.1.2.2	Abstract Risk of Abuse of Commitments for Regulatory Purposes	71
3.1.2.3	The Materialisation of the Risks of Enforcement Errors and Instrumentalisation of the Commitment Procedure for Regulatory Purposes	72
3.1.3	Preliminary Comment and Outline of the Remainder of the Present Chapter	73
3.1.3.1	Article 9 Only Increases the Abstract Risk of Over-Enforcement	73
3.1.3.1.1	No Increase in Risk of Under-Enforcement	74
3.1.3.1.2	There Is an Increase in Risk of Over-Enforcement	76
3.1.3.2	Development of a Research Agenda	79
3.1.3.2.1	Importance of Clarifying the Boundaries of Article 7	79
3.1.3.2.2	The Commission’s Use of Novel Theories of Harm or the Pursuit of Regulatory Objectives Prove As Such Neither Over-Enforcement Errors Nor a Regulatory Instrumentalisation of Competition Law	81

	3.1.3.2.3	Limitations and Outline of the Following Analysis	83
3.2		General Remarks on Proportionality	87
	3.2.1	In the Context of Article 7	88
	3.2.1.1	The Structure of the Test: Two or Three Steps? . . .	88
	3.2.1.2	Relation Between the Intrusiveness of a Remedy and Its Effectiveness	89
	3.2.1.3	Importance of Monitoring Costs	90
	3.2.1.4	Remedies Addressing a Market or Conduct That Is Not Covered by the Found Infringement . . .	91
	3.2.2	In the Context of Article 9	92
	3.2.2.1	General Observations	92
	3.2.2.2	Coca-Cola	92
	3.2.2.2.1	The Case	93
	3.2.2.2.2	The Criticism	94
	3.2.2.2.3	Comment	94
3.3		The Link Between Harm and Remedy Under Article 7 and Article 9 in General	97
	3.3.1	Terminating On-Going Anticompetitive Conduct	98
	3.3.1.1	Abstract Cease and Desist Orders	98
	3.3.1.2	Concrete Negative Orders	99
	3.3.1.3	Similar Conduct	99
	3.3.1.3.1	Abstract Like Effects Orders	100
	3.3.1.3.2	Concrete Obligations That Aim at Preventing Similar Conduct	100
	3.3.1.4	Positive Orders and the Freedom of Choice of the Concerned Undertakings	118
	3.3.1.4.1	In the Context of Article 7 Regulation 1/03	118
	3.3.1.4.2	In the Context of Article 9 Regulation 1/03	143
	3.3.1.5	The Scope of Remedies and Article 101(3) TFEU	145
	3.3.1.5.1	In the Context of Article 7	145
	3.3.1.5.2	In the Context of Article 9 Regulation 1/03	152
	3.3.1.6	Remedies with Respect to Prices	154
	3.3.1.6.1	Exclusionary Pricing Practices	155
	3.3.1.6.2	Exploitative Pricing Practices	167
	3.3.1.7	Microsoft Tying: An Unbundling Remedy Under Article 7 vs a Must Carry Remedy Under Article 9	179
	3.3.1.7.1	The Theory of Harm	182
	3.3.1.7.2	The Remedies	185
	3.3.2	Addressing Imminent Anticompetitive Conduct	189

- 3.3.3 Eliminating the Causes of Future Anticompetitive Conduct 191
- 3.3.4 Eliminating the Subsisting Effects of Past Anticompetitive Conduct 191
 - 3.3.4.1 In the Context of Article 7 192
 - 3.3.4.1.1 General Remarks 192
 - 3.3.4.1.2 Follow-On Contracts 200
 - 3.3.4.1.3 Disgorgement, Restitution and Compensation 204
 - 3.3.4.2 In the Context of Article 9 Regulation 1/03 210
 - 3.3.4.2.1 The “Competitive Reset” in E-Books . . . 210
 - 3.3.4.2.2 Disgorgement, Restitution and Compensation in the Context of Article 9 212
- 3.4 In Particular: So Called Structural Remedies 213
 - 3.4.1 The Irrelevance of the Distinction in the Context of Article 7 213
 - 3.4.1.1 The Impossibility to Distinguish Between Structural and Behavioural Remedies 216
 - 3.4.1.1.1 Doctrine 216
 - 3.4.1.1.2 Position of Commission 219
 - 3.4.1.1.3 Position of EU Courts 221
 - 3.4.1.1.4 Comment 222
 - 3.4.1.2 The Lack of Necessity of a Distinction: No General Subsidiarity of Structural Measures 228
 - 3.4.1.2.1 Subsidiarity of Structural Remedies and the Principles of Articles 101 and 102 TFEU 229
 - 3.4.1.2.2 Subsidiarity of Structural Remedies and Proportionality 242
 - 3.4.1.2.3 Concluding Example: Nord KS/Xella 251
 - 3.4.2 Evaluation of the Criticism Regarding Structural Remedies Under Article 9 252
 - 3.4.2.1 Energy Sector 252
 - 3.4.2.1.1 Vertical Unbundling Through Divestiture of Transmission Grids 252
 - 3.4.2.1.2 Horizontal Unbundling 263
 - 3.4.2.1.3 Swedish Interconnectors 277
 - 3.4.2.1.4 Conclusion Regarding the “Structural” Remedies in the Energy Sector 282
 - 3.4.2.2 Aviation Sector 283
 - 3.4.2.2.1 Limited Value of Contrasting “Structural Control” and “Behavioural Control” . . . 284

3.4.2.2.2	No Doubts As Regards the Fundamental Possibility to Impose Slot Releases Under Article 7	285
3.4.2.3	Deutsche Bahn	286
3.4.2.3.1	The Case	286
3.4.2.3.2	Discussion of Criticism	288
3.5	Ancillary Remedies	292
3.5.1	Information of Customers	292
3.5.2	Reporting to the Commission	293
3.5.3	Delegation of the Implementation of a Remedy	293
3.5.3.1	The Practice of the Commission	294
3.5.3.1.1	Trustees	294
3.5.3.1.2	ADR	304
3.5.3.2	The Microsoft I Judgment and Its Implications	310
3.5.3.2.1	The Case	311
3.5.3.2.2	Discussion	312
3.6	Fundamental Rights and the Scope of EU Law As Further Limitations to the Commission's Powers	321
3.6.1	Fundamental Rights	321
3.6.1.1	The Right to Property and the Requirement of Compensation	322
3.6.1.2	Fundamental Rights and the Consensual Nature of Article 9 Decisions	324
3.6.2	Scope of EU Law	324
3.6.2.1	The Internal Perspective: Appreciable Effect on Competition and on Trade Between Member States	324
3.6.2.2	The External Perspective: The International Dimension of Competition Law	325
3.6.2.2.1	The International Dimension of a Case As a Limit for the Commission's Remedial Power	325
3.6.2.2.2	International Cooperation	331
3.6.2.2.3	Does the Commission Use the Article 9 Procedure to Extract Remedies That Reach Beyond Its Jurisdiction?	332
3.7	Duration and Modification	333
3.7.1	Ex Ante Limitation of the Effects of a Remedy	333
3.7.1.1	In the Context of Article 7	333
3.7.1.2	In the Context of Article 9	334
3.7.2	Ex Post Amendment of Remedies	335
3.7.2.1	The Legal Bases for the Ex Post Amendment of Remedies	336

3.7.2.1.1	In the Context of Article 7: The General Principles of EU Administrative Law	336
3.7.2.1.2	Article 9(2)	339
3.7.2.2	Common Questions Regarding Articles 7 and 9	343
3.7.2.2.1	Discretion vs Obligation to Reopen the Procedure	343
3.7.2.2.2	Importance of the Change of Circumstances Required	348
3.7.2.2.3	Review Provisions	350
3.8	Conclusion on the Relaxation of the Link Between Harm and Remedy	351
	Bibliography	351
4	The Relaxation of Procedural Safeguards	365
4.1	Procedural Safeguards During the Administrative Procedure	365
4.1.1	Concerned Undertakings	366
4.1.1.1	In the Context of Article 7	366
4.1.1.1.1	General Presentation of the Rights of Defence of the Concerned Undertakings	366
4.1.1.1.2	Transatlantic Container Line	367
4.1.1.2	In the Context of Article 9	367
4.1.1.2.1	In Cases with a Statement of Objections	368
4.1.1.2.2	In Cases Without a Statement of Objections	368
4.1.2	Complainants	377
4.1.2.1	In the Context of Article 7	377
4.1.2.2	In the Context of Article 9	378
4.1.3	Other Natural or Legal Persons	382
4.1.3.1	Grundig and Consten	382
4.1.3.2	Procedural Rights During the Administrative Procedure Under Regulations 1/03 and 773/2004 de lege lata	383
4.1.3.2.1	In the Context of Article 7	383
4.1.3.2.2	In the Context of Article 9	384
4.1.3.3	De lege ferenda: A Need for Market Testing Article 7 Remedies?	389
4.1.3.4	Necessity to Carry Out a Market Test for the Ex Post Revocation or Amendment of an Article 9 Remedy	391
4.1.4	The Role of the Hearing Officer	392
4.1.5	Conclusion on the Administrative Procedure	393
4.2	Judicial Review	394

- 4.2.1 Admissibility 394
 - 4.2.1.1 Concerned Undertakings 394
 - 4.2.1.1.1 In the Context of Article 7 394
 - 4.2.1.1.2 In the Context of Article 9 395
 - 4.2.1.2 Complainants 399
 - 4.2.1.2.1 In the Context of Article 7 399
 - 4.2.1.2.2 In the Context of Article 9 400
 - 4.2.1.3 Other Third Parties 400
 - 4.2.1.3.1 Is the Exercise of a Procedural Right During the Administrative Procedure a Necessary Condition for Individual Concern? 401
 - 4.2.1.3.2 Is the Participation in the Administrative Procedure or a Right to Participate Sufficient to Establish Individual Concern? 406
 - 4.2.1.3.3 Individual Concern Irrespective of Procedural Rights 407
- 4.2.2 Scope of Review 408
 - 4.2.2.1 General Observations 408
 - 4.2.2.1.1 The Right to Effective Legal Protection Pursuant to Article 6(1) ECHR and Article 47 Charter 408
 - 4.2.2.1.2 The Current Practice of the EU Courts 414
 - 4.2.2.2 Particularities Regarding the Review of Article 9 Decisions 431
- 4.2.3 Conclusion on Judicial Review 434
- 4.3 Conclusion on the Relaxation of Procedural Safeguards 435
- Bibliography 435
- 5 The Impact of Commitments on Legal Certainty 441**
 - 5.1 Disadvantages of Commitments in Terms of Legal Certainty 442
 - 5.1.1 Lack of Clear Criteria When the Article 9 Procedure Applies 442
 - 5.1.1.1 The Last Sentence of Recital 13 Regulation 1/03 442
 - 5.1.1.2 Guidance Provided by the Best Practices and the Manual of Procedures 444
 - 5.1.1.3 The Commission’s Practice and Its Criticism: Should the Scope of Application of the Article 9 Procedure Be Further Restricted? 445
 - 5.1.1.4 Manifest Error in Choosing the Article 9 Procedure As a Ground for Judicial Review 450

5.1.2	No Right to a Commitment Decision?	451
5.1.2.1	Position of the Commission and the EU Courts . . .	452
5.1.2.2	Doctrine	452
5.1.2.3	Comment	453
5.1.3	Remedies and the Commission's Power to Prioritise Cases	455
5.1.3.1	Enlargement of the Commission's Discretion . . .	456
5.1.3.2	A Limit to the Commission's Powers	458
5.1.3.3	Article 9 Does Not Increase the Commission's Power to Prioritise Cases	459
5.1.4	Effects on Competition Authorities and Courts of the Member States	460
5.1.4.1	Effects on Power to Find an Infringement and Impose a Fine	461
5.1.4.1.1	Article 7 Decisions	461
5.1.4.1.2	Article 9 Decisions	462
5.1.4.1.3	De Facto Effects of Commission Decisions	466
5.1.4.2	Effects on Power to Adopt Further Injunctions or Commitments	466
5.1.4.3	Effects on Private Damages Actions	467
5.1.4.3.1	Article 7 Decisions	467
5.1.4.3.2	Article 9 Decisions	467
5.1.4.4	Can Decisions Be Enforced by National Courts or by National Competition Authorities?	468
5.1.4.4.1	Enforcement of Article 7 and Article 9 Decisions by National Courts	468
5.1.4.4.2	Enforcement of Article 7 and Article 9 Decisions by National Competition Authorities	476
5.1.4.5	Intermediate Conclusion: Comparison of Article 7 and Article 9 Decisions and Comment	479
5.1.4.5.1	Uncertainty Regarding the Imposition of a Fine for Conduct That Predates the Commitment Decision	480
5.1.4.5.2	Reduced Facilitation of Follow on Action	480
5.1.5	Loss of the Positive Externalities of Adjudication	481
5.1.5.1	The Criticism	483
5.1.5.2	Comment	484
5.2	Advantage: Precise and Enforceable Obligations	487
5.2.1	The Problematic Precision of Injunctions Adopted on the Basis of Article 7	487
5.2.1.1	The EU Case Law	489

5.2.1.1.1	Cease and Desist Orders	489
5.2.1.1.2	Abstract Like Effects Orders	494
5.2.1.2	The Stricter Standards Under German Law: Fährhafen Puttgarden	495
5.2.1.3	Discussion	497
5.2.1.3.1	Imprecise Orders to Put an Infringement to an End Do Not Produce Any Discrete Legal Effects	497
5.2.1.3.2	How to Assess Whether a Remedy Is Sufficiently Precise in Order to Serve As the Basis for the Imposition of Periodic Penalty Payments?	500
5.2.1.3.3	Restrictive Interpretation or Annulment?	506
5.2.1.3.4	Concluding Example: Google Search	508
5.2.2	Precision in the Context of Article 9	509
5.3	Conclusion on the Impact of Commitments on Legal Certainty . . .	510
	Bibliography	510
6	Outlook: Discussion of Reform Proposals	517
6.1	Reform Proposals Relating to Article 9 Decisions	518
6.1.1	Limiting the Scope of Application of Article 9	519
6.1.2	Access to the File	519
6.1.3	Participatory Rights of Complainants	519
6.1.4	Judicial Control	520
6.1.4.1	More Detailed Reasoning and More Comprehensive Analysis by the Commission	520
6.1.4.2	Subjection of Commitment Decisions to Prior Approval by the EU Courts	522
6.1.4.2.1	Judicial Control of Consent Decrees Under the US Tunney Act	522
6.1.4.2.2	A Model for the EU?	524
6.1.4.2.3	Exclusion of the Right of Complainants to Appeal Commitment Decisions	529
6.2	Reform Proposals Relating to Article 7 Decisions	530
6.2.1	Market Test	530
6.2.2	Increasing the Commission’s Flexibility?	530
6.2.3	Relationship Between Commitment Procedures and Fines . . .	532
6.2.3.1	Extending the Settlement Procedure to Non-cartel Cases?	532
6.2.3.1.1	The Reasons for the Restriction of the Scope of Application of the Settlement Procedure	532

6.2.3.1.2	Different Objectives of the Commitment Procedure and the Settlement Procedure	534
6.2.3.1.3	No Significant Mitigation of the Disadvantages of the Commitment Procedure	535
6.2.3.1.4	No Necessity to Extend the Scope of the Settlement Procedure Given the Existence of Other Means to Combine an Infringement Decision with a Cooperative Solution Regarding the Remedy	536
6.2.3.2	Revision of Fining Guidelines to Take Cooperation of Undertakings into Account?	537
6.2.3.3	Prohibition to Impose a Fine Subsequent to the Issuance of a Preliminary Assessment?	538
6.2.4	Reform of the Procedure Before the EU Courts	541
6.2.4.1	Increased Judicial Review of Infringement Decisions and Fines?	541
6.2.4.2	Speeding Up Court Procedures?	543
6.3	Miscellaneous	545
6.3.1	Increased Use of Informal Closure of Procedures?	545
6.3.2	Increased Use of Interim Measures?	547
6.3.3	Strengthening the Independence of the Administrative Decision Making Process?	549
6.3.4	Strengthening Private Enforcement?	552
6.4	Conclusion on Reform Proposals	554
	Bibliography	555
7	Summary of Key Findings	561